

No. 48780-2-II

Court of Appeals, Div. II,  
of the State of Washington

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**State of Washington,**

Respondent,

**v.**

**Benjamin R. Krogness,**

Appellant.

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Reply Brief of Appellant

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## 1. Reply Argument

Benjamin Krogness pled guilty to possession and delivery of heroin. He qualified for, and received, a Drug Offender Sentencing Alternative. Without any inquiry into Krogness's present or future ability to pay legal financial obligations, the trial court imposed discretionary LFOs, including recoupment of appointed attorney's fees totaling \$600, drug fines totaling \$2,000, and a crime lab fee of \$100.<sup>1</sup>

Discretionary LFOs cannot be imposed without an individualized inquiry into the defendant's ability to pay. *See, e.g., State v. Marks*, 185 Wn.2d 143, 145, 368 P.3d 485 (2016). Mandatory LFOs—restitution, crime victim assessment, DNA collection fee, and criminal case filing fee—are not subject to this obligation. *State v. Clark*, 195 Wn. App. 868, 872, 381 P.3d 198 (2016) (citing *State v. Clark*, 191 Wn. App. 369, 373, 362 P.3d 309 (2015)). Most other LFOs are discretionary. *Id.*

Attorney's fees are a discretionary LFO that cannot be imposed without the required inquiry. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015). The drug fines are also

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<sup>1</sup> The State points out that the court did not impose costs of incarceration, citing CP 36. This appears to be correct. The court ordered payroll deduction of \$25 per month, but this was to cover the other LFOs, not costs of incarceration. The box for costs of incarceration is not checked, so that cost was not imposed.

discretionary based on the defendant's indigency, therefore the same inquiry should be required. *See* RCW 69.50.430(2) (fine may be suspended for an indigent defendant). Although the fine is not a cost subject to RCW 10.01.160(3) (the source of the *Blazina* inquiry), the statute authorizing the fine **does** make it discretionary when the defendant is indigent, and imposing a fine without conducting a *Blazina*-type inquiry is an abuse of discretion. *See State v. Clark*, 191 Wn. App. at 376 (noting that the inquiry could establish a tenable basis to protect the fine from a challenge on appeal).

The State notes that the \$100 crime lab fee imposed by the court was a discretionary LFO that also requires a *Blazina* inquiry. Br. of Resp. at 1; *but, cf. State v. Clark*, 195 Wn. App. at 873 (holding the particular statutory language authorizing the crime lab fee makes it mandatory). Even if the crime lab fee was mandatory, it should not have been imposed without an individualized inquiry into Krogness's ability to pay. *See State v. Seward*, \_\_\_ Wn. App. \_\_\_, No. 47581-2-II, 2016 WL 6441387, at \*4-5 (Nov. 1, 2016) (Bjorgen, J., dissenting) ("the assessment of mandatory LFOs with no inquiry into ability to pay fails the rational basis test" and violates due process, because imposition of a fine on a person who has no ability to pay defeats the purpose of the fine). "LFOs should be imposed only if an

individual has a present or future ability to pay.” *City of Richland v. Wakefield*, 186 Wn.2d 596, 380 P.3d 459, 461 (2016).

The State concedes that the attorney’s fees, the drug fine, and the crime lab fee were all discretionary LFOs that could not be properly imposed without an individualized inquiry into Krogness’s ability to pay. The State agrees that this Court should reverse these LFOs and remand for a proper inquiry.

## 2. Conclusion

Given the State’s concession of error, this Court should reverse the trial court’s imposition of attorney’s fees of \$600, drug fines of \$2,000, and a crime lab fee of \$100, and remand for an individualized inquiry into Krogness’s ability to pay LFOs.

Respectfully submitted this 7<sup>th</sup> day of December, 2016.

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## CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on December 7, 2016, I caused the original of the foregoing document to be filed and served by the method indicated below, and addressed to each of the following:

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